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No. 04-373

In The
Supreme Court of the United States

STATE OF MARYLAND,

Petitioner,

v.

LEEANDER JEROME BLAKE,

Respondent.

On Writ Of Certiorari
To The Court Of Appeals
Of Maryland

BRIEF OF AMICUS CURIAE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

When a police officer improperly interrogates a suspect after invocation of the suspect's right to counsel, does *Edwards v. Arizona*, 451 U.S. 477 (1981), permit consideration of curative measures by the police, or other intervening circumstances, to conclude that a suspect later initiated communication with the police within the meaning of *Edwards*?

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BRIEF OF AMICUS CURIAE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION

THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION files this amicus curiae brief pursuant to this Court's Rule 37.3(a) in support of respondent Leeander Blake's assertion of rights under the Fourteenth Amendment. Both petitioner and respondent have granted amicus consent to file this brief, and letters of consent have been filed with the clerk of this Court.[1]

INTERESTS OF AMICUS CURIAE

The National Legal Aid and Defender Association (NLADA), a nonprofit corporation, works to support indigent defender services and civil legal assistance to those who cannot afford lawyers. Through its Defender Legal Services division, NLADA provides training, information, and technical assistance to public defender offices and others who provide legal services to indigent criminal defendants. NLADA American Council of Chief Defenders is a leadership council that is dedicated to promoting fair justice systems and ensuring that citizens who are accused of crimes have adequate legal representation. NLADA has approximately 680 program members, representing 12,000 lawyers, including nonprofit organizations, government agencies, legal aid organizations, and law firms; NLADA also has approximately 1,000 individual members.

[1] No counsel for any party to this case authored this brief in whole or in part, and no person or entity, other than NLADA, made any monetary contribution to its preparation or submission. *See* Rule 37.6.

NLADA traces its roots to the National Alliance of Legal Aid Societies, which was formed by 15 legal aid societies in 1911. It is the oldest and largest national nonprofit membership association that devotes its resources exclusively to serving the equal justice community.

NLADA is a leading voice in public policy debates on equal justice issues. In pursuit of that effort, NLADA has filed amicus curiae briefs in major constitutional cases before this Court involving the administration of the criminal justice system and the right to counsel.

NLADA is filing this brief because it believes that if the claims asserted by petitioner are adopted by this Court, the right to counsel recognized and respected by *Miranda v. Arizona* and *Edwards v. Arizona* will be gravely weakened and will easily and routinely be circumvented by interrogators manipulating prisoners in custody into waiving their rights.

STATEMENT OF FACTS

On October 25, 2002, Terrence Tolbert was arrested for the murder of Straughan Lee Griffin. Tolbert implicated respondent in the crime (JA 397). Between 4:30 and 5:00 a.m. the next day, the 17 year-old respondent was arrested at gunpoint in his home, while watching television, wearing boxer shorts and a tank top with no shoes. He was not permitted to put on any other clothing but was handcuffed and taken to the Annapolis Police Department by uniformed officer Curtis Reese, among others (JA 177, 354-56, 397, 401).

Respondent was taken to a room in the police station where he was confronted by the detective in charge of the investigation, William Johns, who attempted an interrogation. Detective Johns advised respondent of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), and respondent told him he did not wish to speak to any police officers without an attorney. He was then placed in a holding cell (JA 183-84, 398).

About thirty-five minutes later, Detective Johns and Officer Reese returned to respondent's holding cell and handed to him a written statement of the charges against him, which included first-degree murder, armed robbery and armed carjacking. In large capital letters, the penalty for the first degree murder charge read, "DEATH." The statement of "charges" also included an allegation that Tolbert had asserted that respondent had shot the victim and ran over his body with his car (JA 340). Detective Johns read the "charges" and the penalty to respondent and then advised him that, "They are serious charges. He needs to read it carefully and make sure he understood it" (JA 22-23, 398-99). Officer Reese then loudly confronted respondent and said, "I bet you want to talk now, huh?" (JA 23). Detective Johns then said to Reese, "No, he doesn't want to talk to us. He already asked for a lawyer. We cannot talk to him now." The officers left (JA 23, 399).

Less than half an hour later, Detective Johns returned alone to the cell, carrying some of respondent's clothing, which he handed to respondent. Respondent then asked him, "I can still talk to you?" Detective Johns re-Mirandized respondent and another interrogation began. Respondent made some incriminating statements and was polygraphed, in a process that began about 8:30 or 9:00,

after which he made additional incriminating statements (JA 25-26, 28, 37-38).

The trial judge, after an evidentiary hearing in which all the participants testified, ordered respondent's incriminating statements suppressed, as having been obtained in violation of *Miranda* and *Edwards v. Arizona*, 451 U.S. 477 (1981) (JA 366). Although crediting Detective Johns whenever his testimony differed from respondent's (JA 400), the trial judge nonetheless found that, after respondent asserted his right to counsel, the interrogation did not "cease" but continued, in a course of state action that the state both should have realized and did realize was likely to lead to an incriminating response (JA 357, 359-60). The incriminating responses that followed were the product of that prohibited interrogation (JA 359-60).

The trial judge considered the entire context in which the respondent gave his statement. Factors in the trial judge's decision were the respondent's age, that he apparently had been up all night, was arrested in the predawn hours, while watching cartoons in his underwear, shoeless. He was taken in this condition, in handcuffs, to the police station. After he invoked his rights, he was given a copy of the charges against him that erroneously stated that the charges carried the penalty of "DEATH." Also included in the documents ostensibly stating the "charges" was a statement that Tolbert had blamed respondent for shooting the victim and running over him with his car. Detective Johns, respondent's unsuccessful interrogator, also read the charges to the respondent and told him the charges were "serious" and he needed to "make sure he understood [them]" (JA 356).

The confrontations did not stop there. When respondent's arresting officer, Mr. Reese, said to respondent in a loud, confrontational tone, "I bet you want to talk now, huh?," the trial judge found this was interrogation (JA 357), and that Officer Reese's statement clearly referred to the charges that had just been handed to respondent (JA 359-60). The trial judge also found that Detective Johns' statement that respondent "doesn't want to talk to us. He already asked for a lawyer. We cannot talk to him now," did not erase the effects of the false statement about the death penalty, the statement that Tolbert blamed respondent for the murder, or Officer Reese's clear suggestion that respondent talk about the charges (JA 416).

Moreover, the trial judge found Detective Johns' statement that we "cannot talk to him now," followed by the officers leaving, set the stage for Detective Johns' return later (JA 358-60). What Detective Johns said to Officer Reese was not, "We can't talk to him until he has a lawyer," it was, "We can't talk to him now." When Detective Johns appeared later with the clothing, a natural question that might occur to respondent was, "I can still talk to you?" According to the trial judge, the short time intervening between Reese and Johns' statements and Johns' reappearance did not fundamentally alter the dynamics. Reese had urged respondent to talk "now." Johns said they couldn't talk "now." Johns' return 28 minutes later was the first time that respondent had a chance to respond to the charges, the threat of the death penalty, the statement blaming respondent for shooting and driving over the victim, and to Reese's urgings (JA 358-60). The trial judge found that respondent's statement to Detective Johns was clearly a result of what had transpired

shortly before and that what had transpired was a clear violation of *Miranda* and *Edwards* (JA 360-61).

The Maryland Court of Special Appeals reversed, holding that the police actions in question did not amount to interrogation (JA 388). The Court of Appeals of Maryland unanimously reversed the intermediate court and upheld the trial court's suppression of respondent's statements (JA 418). This Court granted the State's petition for a writ of certiorari.

SUMMARY OF ARGUMENT

I.

The Question Presented, upon which this Court granted the petition for a writ of certiorari, is not actually present in this case. There was no claim below and no suggestion by any court below that a re-interrogation by police in violation of *Miranda* and *Edwards* necessarily precludes a later "initiation" by the suspect. Both parties in this case agree that it is possible for "curative" measures or other circumstances to reduce or counteract the effects of an improper interrogation and to allow a genuine re-initiation of interrogation by the suspect. The court below plainly agreed as well. Thus, since there is no dispute about the general proposition stated in the Question Presented, there is only an issue of fact: whether under all the circumstances, within the meaning of *Edwards*, the suspect in this case "initiated" a general discussion of the facts of the crime with the police.

Whether there was such an "initiation," the court below held – and both parties agree – depends upon an

evaluation of the entire context and circumstances. The trial judge, who alone saw and heard all the participants testify, was in the very best position to determine the factual issues. The court below unanimously upheld her factual determinations. Since this Court does not sit to redetermine factual issues decided by lower courts – especially State courts – the petition for a writ of certiorari appears to have been improvidently granted.

II.

For four decades, this Court has consistently and repeatedly affirmed the right of a suspect in police custody to remain silent and to consult an attorney before and during police interrogation. *Miranda v. Arizona*, 384 U.S. 436, 470 (1966). The Court has also recognized that many persons in custody need the assistance of counsel to advise them before deciding whether to submit to police interrogation or to negotiate less coercive, less threatening, more reliable conditions for such an interrogation. The Court has also repeatedly held that one in police custody may choose to waive both the right to remain silent and the right to counsel, even if doing so is gravely imprudent and even if based upon numerous erroneous assumptions about the interrogation process. If, after receiving the warnings required by *Miranda*, a suspect says that he wishes to consult with counsel, all interrogation must stop and the invocation of the right to counsel must be scrupulously protected by the police. Under *Edwards* and its progeny, no re-interrogation can occur thereafter unless the suspect is afforded counsel or, unless the suspect himself "initiates" a general discussion about the crime or charges with the police.

Whether the suspect "initiated" a general conversation with the police about the facts of the crime or charges turns not only on what the suspect said but on the entire context of the statement, including what preceded that statement and what influences were brought to bear upon the suspect prior to the alleged "initiation."

If there have been no police influences imposed upon the suspect since he invoked his right to counsel (other than those generally incident to incarceration), and the suspect not only suggests he would like to talk to the police but says he wants to talk about the crime or charges, he has "initiated" within the meaning of *Edwards*, even if third parties unconnected with the police have influenced his decision. The police have no control over such influences and it is the suspect's right and responsibility to evaluate them as he sees fit.

If, on the other hand, the police have engaged in acts or statements that encouraged the suspect to reconsider his decision to consult counsel, a court must examine such acts or statements and determine what effect, if any, they had on the statements made by the suspect that constitute the alleged "initiation." If the suspect's statements are clearly the result of such police activities – whether or not those activities constitute the functional equivalent of interrogation – then it would be absurd to label the suspect's statements as "initiation." Rather, they would be the result of the activities of the police which produced them. The exception to the *Edwards* rule would not apply and subsequently obtained incriminating statements should be suppressed.

Where, as here, the police have engaged in interrogation in violation of *Miranda* and *Edwards*, and the statement of

the suspect is plainly in response to such interrogation and closely follows upon it, to find that the suspect's statement fulfilled the *Edwards* exception would be tantamount to overturning *Edwards* itself, for it would invite police to do what *Edwards* and many other decisions of this Court have said they should not do – try to persuade the suspect to retract his decision to consult counsel and instead submit to interrogation without counsel.

A suspect in custody on serious criminal charges, especially a 17 year-old arrested in his underwear near dawn, is vulnerable to manipulation by the police. If the police were free to encourage a suspect to reconsider his decision to consult counsel, that decision would be disrespected and trivialized and the essence of *Edwards* flouted. On the other hand, if the police engage in improper efforts to manipulate the decision of the custodial suspect, as here, they are not forever precluded from interrogating the suspect. If, after he consults counsel, or even after intervening events demonstrate that the previous manipulations have lost their influence, the suspect initiates conversations based upon other considerations, nothing in the *Edwards* doctrine precludes the suspect from waiving his rights.

ARGUMENT

I.

THE PETITION MAY HAVE BEEN IMPROVIDENTLY GRANTED

The court below granted review "to consider the single question of whether the police actions in question constituted the functional equivalent of interrogation, following

petitioner's invocation of his Miranda rights. . . . *Blake v. State*, 378 Md. 176, 835 A.2d 1103 (2003)." Pet. App. 2a. The court answered that question in the affirmative and reinstated the findings of the trial judge. This Court granted Maryland's petition for a writ of certiorari to consider not whether the police engaged in the "functional equivalent of interrogation," but rather whether "*Edwards* permit[s] consideration of curative measures by the police, or other intervening circumstances, to conclude that a suspect later initiated communication with the police." That issue is not properly presented to this Court by the decision of the court below. Not only is that not what the court below granted review to consider, nothing in the court's opinion questions or casts doubt upon that proposition. Respondent did not contend below that curative measures are impossible or that improper interrogation prohibited by *Edwards* necessarily precludes a subsequent "initiation" by the suspect, nor did the court below make such a suggestion. In fact, the court below clearly acknowledged that a suspect's "initiation" is possible after an *Edwards* violation.

There is no controversy about principles

Maryland correctly accepts the conclusion of the court below that the police interrogated respondent after he invoked his right to counsel in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966) and *Edwards v. Arizona*, 451 U.S. 477 (1981). All that petitioner challenges in the decision below is the court's conclusion that respondent did not "initiate" a conversation with Detective Johns about the facts of the case, as that concept is employed in *Edwards* and subsequent decisions applying *Edwards*. But the Maryland court's conclusion was clearly not based on the notion that an *Edwards* violation forever precludes a

suspect from "initiating" a conversation culminating in a knowing waiver of *Miranda* rights. In suggesting otherwise, petitioner has created an adversary of straw, a fictional opponent, a nonexistent controversy. As if criticizing the court below, petitioner says, "Even assuming an impermissible remark by Officer Reese, to ascertain whether Blake initiated communications before knowingly and intelligently waiving his right to counsel, one 'must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect.'" Pet. 14, quoting *Oregon v. Elstad*, 470 U.S. 298, 318 (1985). *See also* Pet. 7, Pet. Br. at 10, 17. Yet this is what the court below said as well. As the record abundantly demonstrates, both the trial judge and the Court of Appeals exhaustively examined all the circumstances surrounding the police actions in question and found that while an "initiation" was possible after an improper interrogation, respondent did not "initiate" the conversation in the instant case. Apart from that fact-bound result, it is difficult to see what disagreement petitioner has with the decision below.

Attempting to convert its disappointment on the core issue decided below – that the police interrogated respondent – into a different question, and an issue of Constitutional law as well, petitioner implied that the court below failed to consider whether the remarks of Detective Johns cured or corrected the efforts to interrogate respondent that immediately preceded Johns' remarks. Pet. 7-8. The State also implied that the court below ruled that the police can never cure an *Edwards* violation. Pet. 14 ("It certainly cannot be the case that Officer Reese's comment forever taints a subsequent waiver.") To the contrary, the court below clearly assumed that curative remarks are possible and that an arrestee can still "initiate" conversations

with the police after the authorities have violated *Miranda* and *Edwards*. The court found, however, as had the trial judge, that the remarks of Detective Johns did not cancel or overcome the effects of the erroneous "DEATH" message, the claim that Tolbert blamed respondent for the murder, and the related invitation of officer Reese to "talk now" (JA 417-18). The trial judge saw and heard the witnesses and made findings based upon her evaluation of their demeanor and their testimony. The trial judge found that respondent's incriminating statements were in response to and a result of the functional interrogation that occurred less than half an hour before (JA 357-61). Neither the trial judge nor the court below suggested that an improper interrogation following an invocation of *Miranda* rights can never be cured by an appropriate statement, a substantial time interval, or other circumstances.

A question of fact for which deference is due

The crux of petitioner's disagreement with the court below is not about whether *Edwards allows* for curative measures, but rather whether the court evaluated the evidence in this case correctly. Accordingly, it is difficult to see how this Court has before it any Constitutional principle for review. *Rogers v. United States*, 522 U.S. 252, 259 (1998) (O'Connor, J., concurring in result) ("[W]e granted certiorari to address an important issue of constitutional law, and we ought not to decide the question if it has not been cleanly presented."). Whether the functional interrogation of respondent was causally related to respondent's question to Detective Johns, "Can I still talk to you?," is an issue the resolution of which rests heavily on an evaluation of the particular context, including the personalities

of the parties, their psychological interactions, and numerous other circumstances. As this Court has often observed, the trial judge has unique advantages in making such factual determinations, which should not be disturbed unless clearly erroneous. *See, e.g.*, *Arizona v. Fulminante*, 499 U.S. 279, 287 (1991) ("We normally give great deference to the factual findings of the state court," citing *Davis v. North Carolina*, 384 U.S. 737, 741 (1966); *Haynes v. Washington*, 373 U.S. 503, 515 (1963); *Culombe v. Connecticut*, 367 U.S. 568, 603-04 (1961)); *see also*, *Mincey v. Arizona*, 437 U.S. 385, 407 (1978) (Rehnquist, J, concurring in part, dissenting in part) ("By all of these standards enunciated in our previous cases, I think the Court today goes too far in substituting its own judgment for the judgment of a trial court and the highest court of a State, both of which decided these disputed issues differently than does this Court, and both of which were a good deal closer to the factual occurrences than is this Court.") This Court does not sit to second-guess factual determinations by trial judges, especially those sitting on State courts. *See, e.g.*, *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987) ("A court of law, such as this Court is, rather than a court for correction of errors in factfinding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."); *Haynes v. State of Washington*, 373 U.S. 503, 515-16 (1963) ("As state courts are, in instances such as this, charged with the primary responsibility of protecting basic and essential rights, we accord an appropriate and substantial effect to their resolutions of conflicts in evidence as to the occurrence or nonoccurrence of factual events and happenings. This is particularly apposite because the trial judge and jury are

closest to the trial scene and thus afforded the best opportunity to evaluate contradictory testimony.")

The writ of certiorari should be dismissed as improvidently granted.

II.

THE DECISION BELOW WAS CORRECT

A. The Right to Counsel Prior to and During Custodial Interrogation is Fundamental and Must be Protected.

In *Miranda v. Arizona*, 384 U.S. 436 (1966), which this Court recently reaffirmed in *Dickerson v. United States*, 530 U.S. 428 (2000), the Court stressed the importance of counsel to one subjected to custodial interrogation. That importance is as great today as it was four decades ago.

The interrogation process

In *Miranda*, the Court elaborated on the psychological pressures inherent in custodial interrogation and quoted police interrogation manuals which described the tricks and techniques of successful interrogation. The interrogator is advised to assume the guilt of the suspect and not concede for a moment that he might be innocent. Self-incrimination is to be encouraged by minimizing the seriousness of the offense, by offering sympathy and moral excuses for what is assumed to have been the crime committed by the suspect. Outright lies are also recommended, including, where appropriate, phony lineups where phony witnesses select the suspect. *Miranda*, 384 U.S. at 453. Interrogators can act in tandem, playing "Mutt and Jeff," where "Mutt," one of the

interrogators, is hostile and threatening and the other, "Jeff," pleasant, comforting and protective, objecting to the tactics of "Mutt," and reassuring the suspect that he can be trusted and is sympathetic to the suspect. Later, "Jeff makes his plea for cooperation [when] Mutt is not present in the room." *Id.* at 452. An attorney who is aware of these techniques and their coercive pressures can prevent them from being used or at the very least act as a witness to what transpires during custodial interrogation. If, after consulting with an attorney, the suspect is asked to submit to interrogation without the attorney being present, and the suspect is interested in submitting to same, the attorney can at least warn the suspect of the pitfalls, tricks and lies he may be subject to and can try to negotiate more reliable, less coercive conditions for the interrogation, such as audio or video taping.

Many who read *Miranda* shortly after it was decided understood it to mean that most of the practices described in the manuals were now prohibited. For example, the Court said that if after being warned, a suspect wished to waive his right to silence and to the assistance of counsel, merely answering questions would not constitute a waiver. In fact, there would be a "heavy burden on the police to prove a knowing, intelligent waiver." The Court also said that a decision to talk to the police was always provisional and revocable at will. There could be no waiver that would require the suspect to submit to further questioning if he changed his mind. *Id.* at 474, 476 n. 45. It is imperative that the "right to choose between silence and speech remains unfettered throughout the interrogation process." *Id.* at 469. Moreover, "any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege." *Id.* at 476. Nor may the prosecution "use at trial

the fact that the suspect stood mute or claimed his privilege in the face of accusation." *Id.* at 468 n. 37.

The importance of respecting *Miranda's* right to counsel

The regime that many anticipated after *Miranda* did not materialize. *Miranda* has been stripped to its fleshless skeleton by hostile interpretations. *See* White, Miranda's *Waning Protections* (2001). If the warnings required by *Miranda* are delivered (it does not matter in what tone of voice or even with some additional, undermining or contradictory observations thrown in) and the suspect answers questions thereafter, most courts hold that all rights have been waived. Although the suspect still has an abstract right to stop the interrogation at any time, no one is required to tell him that, and very few interrogators do. Although silence cannot be used at trial to convict the defendant, the police need not tell him that either. Neither must the police refrain from lies and tricks. Taking the lead from such cases in this Court as *Frazier v. Cupp*, 394 U.S. 731 (1969), all courts seem to agree that once the suspect begins to talk after receiving the four-pronged warning required by *Miranda*, all the old lies and tricks can be used with impunity. *See* Young, *Unnecessary Evil: Police Lying in Interrogations*, 28 CONN. L. REV. 425 (1996). The police manuals on interrogation techniques have changed very little. Indeed, the major changes in the intervening four decades appear to have been the incorporation of new psychological techniques to induce confessions. *See, e.g.*, Inbau, et al., *Criminal Interrogation and Confessions* (4th ed. 2004).

Once a suspect waives his right to consult counsel, he is fair game for the police, and is hopelessly overmatched and outmanned. Custodial interrogation is no less "inherently coercive" today than it was before *Miranda* was decided. And the flow of confessions has not significantly subsided. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishing Small Social Costs*, 90 NW. U. L. REV. 500 (1996). Today, no less than in 1966, "the individual's right to have counsel present at the interrogation is indispensable." *Miranda*, 384 U.S. at 469.

Courts agree that a suspect can make a "knowing and intelligent waiver" of his right to silence and his right to have counsel present, even though he does not know what crime the police are investigating, or that the police will be free to lie to him, threaten him, and trick him once he agrees to talk, and even though he does not know that he can stop the interrogation any time, and even though he erroneously believes that if he does not submit to interrogation his silence can be used against him. Such a "waiver" conclusion is borderline fiction, and underscores the importance of respecting the initial decision of the suspect to consult counsel.

Most suspects would be well-advised to consult an attorney before submitting to interrogation. The attorney is an invaluable protection against coercion, fraud, abuse and police "testilying." That right should be scrupulously protected as a last meaningful remnant of the "system" that the Court sought to "delineate" in *Miranda*. 384 U.S. at 471.

Protecting the innocent

The need to protect the right to silence and the concomitant right to counsel is not merely to protect the

suspect against being pressured, tricked, lied to and threatened, but to protect the innocent. *Id.* at 455 n. 24. Interrogation techniques that are commonplace in American police interrogation rooms are not merely effective against the guilty, they also elicit confessions from the innocent. *See generally*, Leo, *Miranda and the Problem of False Confessions, in The Miranda Debate* 271 (Leo & Thomas eds., 1998). Of the first 62 convicted persons who were exonerated by DNA matching, 15 of them had falsely confessed. Scheck, Neufeld & Dwyer, *Actual Innocence* App. 2 (2000). In 1989, five young men confessed, four of them in writing, most of them in the presence of their parents and on videotape, to the rape and near fatal beating of a jogger in Central Park, New York. They even pled guilty. DNA analysis and a subsequent confession and corroborative evidence later established that all five men were innocent of the crime. It had been committed by a single rapist. Borteck, *Pleas for DNA Testing: Why Lawmakers Should Amend State Post-Conviction DNA Testing Statutes to Apply to Prisoners Who Pled Guilty*, 25 CARDOZO L. REV. 1429, 1447 (2004).

B. *Edwards* Does Not Allow "Initiations" Generated by the Police to Void the Right to Counsel.

Although we do not believe the issue is properly before this Court, should the Court nonetheless choose to revisit *Edwards* and whether curative measures are possible after post-invocation interrogation, the Court should be careful not to invite gross circumvention of *Edwards*, leaving that doctrine an empty vessel. "*Edwards* is grounded in the understanding that 'the assertion of the right to counsel [is] a significant event'" and that "additional safeguards are necessary when the accused asks for

counsel." *Michigan v. Jackson*, 475 U.S. 625, 636 (1986). "The simple fact that defendant has requested an attorney indicates that he does not believe that he is sufficiently capable of dealing with his adversaries singlehandedly." *Id.* at 633 n. 7. The importance of counsel and a decent respect for the right of an arrestee to consult counsel requires that his decision be scrupulously respected. An arrestee who says he wants to consult counsel rather than submit to interrogation can easily have that decision undermined by subtle manipulations.

The *Edwards* doctrine holds that once a suspect in custody has invoked his right to counsel, incriminating statements subsequently obtained by police interrogation are inadmissible unless the suspect has conferred with counsel or has himself "initiated" conversations with the police about the crime and has knowingly and intelligently waived his *Miranda* rights. This rule is necessary to prevent "persistent attempts by officials to persuade [the suspect] to waive his rights. . . ." *Minnick v. Mississippi*, 498 U.S. 146, 153 (1990) or, "to protect an accused in police custody from being badgered by police officers. . . ." *Oregon v. Bradshaw*, 462 U.S. 1039, 1044 (1983) (plurality opinion). The ultimate question, in a case like the present, therefore, is not whether the police improperly "interrogated" the suspect or even whether they "badgered" him, but whether he "initiated" the incriminating conversations. We agree with petitioner, and with amici, and with the court below, that it is possible for the suspect to "initiate" after being "badgered" or even re-interrogated, but we strongly disagree with petitioner's claim that Detective Johns' presentation and explanation of the charges, and the fact (if it was a fact) that Tolbert had blamed respondent for shooting the victim and running over his body was "irrelevant" to

whether respondent "initiated" a reopening of interrogation (Pet. Br. at 28-29). Petitioner's further claim that Officer Reese's suggestion that respondent should want to "talk now" is also irrelevant can hardly be serious.

The significance of context

As petitioner correctly contends, in "determining whether an accused has initiated further contact with the police, the entire course of conduct should be considered" (Pet. Br. 10, 25). And whether the suspect himself "initiated" cannot be meaningfully determined without examining the activities of the police between the invocation of counsel and the alleged "initiation." The mere fact that a suspect says to a policeman, "I can still talk to you?" cannot be found to be an "initiation" in the abstract. A mere suggestion by a suspect in custody that he wants to "talk" to a policeman is not the kind of "initiation" contemplated by *Edwards*. Without the context, such a statement could be preliminary to a request for food, drink, clothing, or a phone call, not "a willingness and a desire for generalized discussion about the investigation." *Bradshaw*, 462 U.S. at 1045-46.

The court below reasonably concluded that respondent's question, "I can still talk to you?" was triggered by the interactions shortly before and was not an "initiation" in the sense in which that concept has been employed by this Court. Whether what the police did during that earlier encounter constituted "interrogation," "badgering," or an "attempt" to "persuade" respondent to "waive his rights," is not the ultimate issue. The issue is whether, under all the circumstances, the respondent himself, on his own accord, based upon a change of mind not induced

by the police, decided to engage in "a generalized discussion about the investigation" without the benefit of counsel. There can be only one answer: the one given by the court below.

In arguing that what transpired between the police and respondent half an hour before the alleged "initiation" is "irrelevant," petitioner implicitly argues that "initiation" should be given a formalistic meaning divorced from the realities of the custodial context. Thus, petitioner asserts that it is immaterial whether the alleged "initiation" was the "fruit" of the impermissible interrogation (Pet. Br. 20). Petitioner seems to contend that there are only two relevant questions to be answered in determining whether the suspect "initiated" the conversation: (1) did the suspect know that he still had the right not "to talk to the police without his attorney" (*Id.* at 25) and, (2) did the suspect use words that suggested a desire to talk or have a "conversation" with the police? (*Id.*) Manifestly, however, to substitute this test for the one this Court has repeatedly applied would destroy the essence of *Edwards* and invite the very kind of "badgering" that the Court has sought to prevent. It is of course inconsistent with the suspect's "unfettered choice" to tell him, as in *Minnick*, 498 U.S. at 149, that "you have to talk," but refraining from telling such a lie does not seriously impede or discourage the police from attempting to induce the suspect to reconsider his decision to consult counsel. Petitioner's approach constricts the essence of *Miranda* and *Edwards* into nothing more than assuring that the suspect is aware of his abstract rights.[2] That is only a small part of those

[2] Petitioner seems to suggest that all that is necessary to satisfy *Edwards* is a new *Miranda* warning followed by an indication from the

(Continued on following page)

decisions. Equally important is that the invocation of his rights by the suspect must be scrupulously respected, not merely in formalities but in the interactions between the police and the suspect. That respect was not demonstrated below.

A new chapter in the interrogation manuals?

If the Court holds that respondent in this case surrendered his right to counsel by the six words he said 28 minutes after he was improperly interrogated, there will be a new chapter in the police interrogation manuals: "HOW TO GET THE SUSPECT TO TALK AFTER HE SAYS HE WANTS A LAWYER."

A basic response, the manuals will suggest, is to advise the suspect who has invoked his right to counsel that unless he has his own lawyer, one can't be appointed for him by the police but he must wait until he goes to court. Then tell him that if he changes his mind about wanting to consult a lawyer before talking to the police about the charges, he will have to initiate the conversation himself. He will have to tell someone that he has changed his mind about needing a lawyer. Such statements to the suspect would be correct statements of the law. *Cf. Duckworth v. Egan*, 492 U.S. 195 (1989). Under petitioner's reading of this Court's decisions, if the suspect then said, "I will talk now," the suspect's invocation of the

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suspect that he is willing to talk, for the *Miranda* warning itself provides the assurance that petitioner suggests is sufficiently curative. That is clearly not the law, however. Giving repeated *Miranda* warnings after the suspect invokes his right to counsel would probably constitute a re-interrogation rather than satisfying *Edwards*. So also might the "curative measures" suggested by petitioner.

right to counsel would be voided. A second, lawful interrogation could then commence.

If the interrogation manual's standard recommended response to the invocation of counsel does not produce the desired waiver, the manual would probably suggest that the interrogators could use the old good cop/bad cop, or "Mutt and Jeff" routine. Revisit the suspect. Have Mutt provide new and threatening "information" about the charges, such as the penalty the suspect is facing or that the other suspect has incriminated him as the "shooter" or "instigator." Jeff then says, "We can't talk to him about any of that because he said he wants to see a lawyer first. He doesn't have a lawyer and one can't be appointed for him until Monday, so he can't talk to us until then unless he initiates it himself." Mutt and Jeff then leave. Jeff returns later on some pretext or other, such as giving the suspect his clothing. In most cases, the text will opine, the suspect will "initiate" a conversation.

If that doesn't produce the desired response, keep the suspect awake, revisit him periodically and engage him in small talk. He will almost certainly bring up subjects relating to the charges, such as, "When will I go to court?," "What about bail?," "When can I see a lawyer?," and so forth. You can discuss these things with him and if he edges over into the facts of the crime, he has "initiated" and thereby rescinded his request for counsel.

If these hypothetical provisions in the next edition of Inbau et al. become reality, there will be virtually nothing left of *Miranda*'s right to counsel. That right is rarely invoked today; it would almost never be effectively invoked under the regime envisioned above.

An *Edwards* violation cannot be ignored in determining "initiation."

Petitioner and amici argue that *Oregon v. Elstad*, 470 U.S. 298 (1985), applies to violations of *Edwards v. Arizona*. *Elstad* held that obtaining a voluntary self-incriminating statement in violation of *Miranda* did not necessarily preclude a subsequent interrogation in compliance with *Miranda* or render inadmissible the results of a *Miranda*-warned interrogation. The subsequent *Miranda* warning "serves to cure the condition that rendered the unwarned statement inadmissible." 470 U.S. at 311. Just how *Elstad* would apply to *Edwards* violations is, however, left unclear. The Criminal Justice Legal Foundation's Amicus Brief argues that just as a "*Miranda* violation does not taint a knowing and intelligent waiver . . . then questioning contrary to *Edwards* should not taint a subsequent decision to initiate a conversation with the police" (p. 19). The Foundation even argues that "a prior *Edwards* violation has no bearing on whether the suspect did in fact subsequently initiate contact with the police." (*Id.*) This cannot possibly be so. The very concept of "initiation" carries with it the idea of self-generation, beginning, first-step: "(a) to begin or set going: make a beginning of: perform or facilitate the first actions, steps or stages of . . . (b) to bring about the initial formation of: originate." Webster's Third New International Dictionary of the English Language (Unabridged) (1993). Whether a conversation is "initiated" necessarily requires an examination of what transpired beforehand – whether the conversation is responsive to earlier acts or conversations or was generated within the psyche of the initiator rather than triggered or stimulated by police forces or suggestions.

Determining whether an interrogation subsequent to an invocation of the right to counsel was "initiated" by the suspect is not always easy. But to attempt to answer that question while disregarding a *Miranda/Edwards* violation, i.e., a prohibited "interrogation," would be mindless.

A three-part analysis

There are several potential causes for a suspect who has asserted his right to counsel to change his mind. They fall into three categories:

1. *Influences consistent with "initiation."* Telephonic or other contact with the suspect's family or even an attorney can trigger a change of mind. So can conversations with other inmates in the jail, impatience with delays in getting to court or in getting to see an attorney. A suspect could begin to worry that criminal associates are implicating him with the police and perhaps "cutting a deal" to his disadvantage. Presumably, any such influences, if not generated by the police in an effort to stimulate an "initiation," do not undermine or prevent an "initiation" by the suspect.

2. *Police-dominated influences short of interrogation.* Another group of potential influences could include information, ideas or circumstances produced by the police. These would include, as in this case, reading of the charges or informing the suspect that an associate has implicated him as the "shooter" or the instigator of the crime. They could include statements by the police about the advantages of early cooperation, about the need to "initiate" if the suspect changes his mind about counsel, the disadvantages of "lawyering up," and so forth.

3. *De facto interrogation*. A third category of potential influences are those constituting de facto "interrogation," acts and statements the likely effect of which is to produce an incriminating response.

One source of confusion in efforts to understand and apply *Edwards*, reflected in the briefs of petitioner and amici, as well as court decisions, is the relevance of the second type of influences. These are influences controlled by the police that have a tendency to produce suspect statements which may have the appearances of "initiation." Surely, however, if the police influences tending to produce an "initiation" are strong enough, there is no true "initiation" and a subsequent interrogation would violate *Edwards* even though no prohibited "interrogation" preceded the putative "initiation."

Several propositions emanate from this analysis:

First, whether the suspect "initiated" conversations with the police about the charges after invoking his right to counsel is a complex question, different from but related to whether the police engaged in prohibited interrogation prior to the alleged "initiation."

Second, since the basic question underlying a claim of "initiation" is what actually animated or motivated the suspect to reopen conversations with the police about the crime, it is possible that a suspect who was illegally interrogated in violation of *Edwards* could nonetheless have thereafter "initiated" the conversations. The court below acknowledged this. It is even possible to imagine that improper post-invocation interrogations could actually strengthen a suspect's resolve to insist on consulting counsel but thereafter a family member could have advised him that it was in his best interests to try to talk

himself out of trouble and to do it now before it was too late. Knowing these facts, a court could perhaps conclude that the suspect "initiated" and that a subsequent interrogation was consistent with *Miranda* and *Edwards*. If so, petitioner is right that an interrogation in violation of *Edwards* does not always preclude an "initiation" by the suspect. Clearly, however, whenever an alleged "initiation" follows closely upon an "interrogation," as it did here, a strong inference arises that there was no suspect initiation in any meaningful sense. There should be a very heavy burden on the prosecution to prove that the interrogation had no causal effect on the "initiation." There was no effort to meet such a burden in this case. Rather, the prosecution relied solely on the ambiguous remarks of Detective Johns. Those remarks, in context, could even have been part of a plan or practice to manipulate respondent into reconsidering his request for counsel. Intentionally or otherwise, the interplay between Officer Reese and Detective Johns was reminiscent of "Mutt and Jeff," and the trial judge noted that resemblance (JA 362).

Third, in determining if the suspect "initiated" a conversation with the police, it is appropriate to consider not only whether the police improperly "interrogated" him, as in this case, but also whether they influenced him to "initiate" a conversation. Just as an "interrogation" does not necessarily preclude a subsequent "initiation" by the suspect, the absence of "interrogation" does not guarantee that a subsequent conversation was initiated by the suspect. If there has been no illicit interrogation, it may be appropriate to presume that a putative initiation by the suspect was what it appears to be. It should be possible, however, to show that in fact the putative initiation was manipulated by the police, using ploys and pressures to

produce an "initiation" which manipulations nonetheless fell short of "interrogation." An "initiation", it should be noted, is not necessarily an "incriminating response." Police actions likely to lead to an "initiation" are not necessarily likely to lead to "self incrimination." Hence, police efforts to engineer an "initiation" of conversations can be more subtle than efforts constituting functional interrogation. It is in this sort of inquiry that allegedly "curative" statements or actions by the police have a bearing. Anything the police say to discourage the suspect from reconsidering his decision to consult counsel should be weighed against anything they said and did to encourage him to reconsider. If, weighing all such influences, it is clear that the motivation for reopening conversations emanated from non-police sources, then the suspect "initiated" the conversations.

Fourth, the appropriate legal standards are trinary: (1), Not only "must all interrogation cease" when the suspect requests counsel, (2), so also should efforts to get the suspect to reconsider and "initiate" new conversations. (3), Should the suspect reopen conversations about the crime, a "waiver" should be recognized only if the apparent initiation was substantially the result of influences independent of police activities (other than those incidental to custodial conditions) between the invocation of counsel and the alleged initiation.[3] Any less demanding burden on the prosecution is inconsistent with respect for the suspect's decision to consult counsel.

[3] Under this analysis, it is not necessary to agree with the court below that respondent was functionally "interrogated." Its holding that respondent did not "initiate" a waiver of counsel would still be correct.

More than knowledge of rights is involved

Petitioner contends that all that is needed to cure an interrogation that violates *Miranda/Edwards* is a statement by the police that even though they have just violated their duty in that regard, it is still the suspect's "choice whether to talk to the police, and the police intend . . . to honor that choice" (p. 30). This argument presupposes that the only thing to be "cured" is the implicit suggestion in the de facto interrogation that the suspect's decision to remain silent may not be respected without further efforts to engage him in conversation. But that is only part of the wrong that needs correction: the police have attempted to trigger a reconsideration of the suspect's decision by imparting new "information," some of which is false, some of which may be true, and coupling that with a suggestion that he should reconsider. Merely reassuring the suspect at that point that he has a right of silence cannot establish that his subsequent conversations were the result of his own "initiation."

The amicus brief of the United States suggests that a sufficient curative statement "would have to convey the message that there would be no further police-initiated questioning without counsel while the suspect remained in custody" (p. 16). While nothing remotely like that was said to respondent in the present case, we disagree with the United States that this would be sufficiently curative, since it would not blot out or erase the influence of the erroneous information imparted to respondent or the strong suggestion by officer Reese that respondent should change his mind and "talk now." It would simply send the message that if respondent wished to reconsider talking in light of these new pressures, he will have to be the initiator. If such a message were legally "curative" of improper

interrogation, it could be delivered as part and of the initial interrogation itself, as our hypothetical new police manual might well suggest. It would probably encourage waivers of counsel rather than discourage them. Virtually nothing would be left of *Edwards*. The only curative message that should suffice is one that actually removes or retracts previously conveyed suggestions, implicit or explicit, that the suspect should reconsider. A mere offer to now honor the suspect's request for counsel (unless he initiates a conversation), after having already dishonored that request once, is not responsive to the problem the police created by their pressures for reconsideration. If the police were to say to the suspect, "We agree with you. It is not in your interest to talk to us until you see an attorney and we will not talk to you any more until you see an attorney," *that* would be a curative statement! Had there been such a statement, this case would not be here.

CONCLUSION

For the foregoing reasons, the NLADA respectfully submits that this Court should either dismiss the writ of certiorari as improvidently granted or affirm the decision of the court below.

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